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Supreme Court of the United States

CHRISTOPHER A. LOPEZ,

Petitioner,

v.

RANDY J. DAVIS, WARDEN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, AND THE ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER CHRISTOPHER A. LOPEZ

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of three non-profit, non-partisan organizations with interests in the federal criminal justice system: the National Association of Criminal Defense Lawyers (NACDL), Families Against Mandatory Minimums Foundation (FAMM), and the Association of Federal Defenders (AFD).[1]

The NACDL's membership is comprised of more than 10,000 lawyers and 22,000 affiliate members representing every state. Members of the NACDL regularly represent drug-involved defendants charged in federal courts.

FAMM, which was founded in 1991, conducts research, promotes advocacy, and educates the public regarding the excessive costs of mandatory minimum sentences. FAMM has thirty chapters and 18,000 members nationwide.

The AFD is a voluntary association of assistant federal defenders and other legal workers employed by federal public and community defenders that is dedicated to improving the quality of

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[1]The parties have consented to the filing of this amicus curiae brief. Consent letters from the parties have been forwarded to the Clerk of the Court. In accordance with Supreme Court Rule 37(6), counsel certifies that no counsel for a party authored this brief, and no person or entity other than the amici curiae made a monetary contribution to the preparation or submission of this brief.

justice in the federal criminal justice system. The AFD has more than 300 members.

The present case involves interests fundamental to each organization. The time reduction under 18 U.S.C. §3621(e) not only encourages inmates to conquer their addictions, but preserves public dollars while ameliorating disproportionate mandatory minimum sentences. The amici's first-hand experience may shed light on the demands of in-prison drug treatment, the reduction's importance to prisoners in appropriate mitigation of punishment, and the efficacy of the program in addressing the causes of criminal involvement and preventing recidivism.

SUMMARY OF ARGUMENT

The plain meaning of Section 3621(e) provides that persons convicted of drug trafficking, whose sentences have been enhanced for firearm possession, are categorically eligible for the incentive of a one-year reduction in sentence upon successful completion of residential substance abuse treatment. Effectuating the plain meaning of the statute furthers the congressional goal of promoting participation in a rigorous and difficult residential program that reduces recidivism. At the same time, the sentence reduction only

applies to prisoners who are not categorically so dangerous that they should be excluded from the program as violent offenders.

The initial regulation promulgated by the BOP to implement Section 3621(e) construed the statutory language "convicted of a nonviolent offense" as the opposite of a "crime of violence" under 18 U.S.C. §924(c)(3). However, BOP program statements categorically disqualified all prisoners convicted of drug-trafficking offenses who received a sentence enhancement for weapon possession. Across the country, prisoners challenged their disqualifications.

The overwhelming majority of circuits correctly determined that the plain meaning of "prisoner convicted of a nonviolent offense" included prisoners convicted of drug-trafficking offenses who received the two-level sentencing enhancement for weapon possession. Such prisoners are not convicted of a "crime of violence" under well-established law construing Section 924(c). However, the October 1997 BOP rules reversed these courts' decisions and categorically excluded the formerly-eligible prisoners.

The 1997 rules are invalid for several reasons. First, the BOP violated the Administrative Procedures Act (APA)'s

requirement of notice and comment before implementing the 1997 regulations. The rule-making provisions of 5 U.S.C. §553 expressly apply to BOP rule-making through 18 U.S.C. §3625, and the BOP explicitly invoked the APA in promulgating its interim rule. However, the rule was not published in the Federal Register until October 15, 1997, even though it was formally implemented on October 9, 1997 -- over two months before the expiration of the December 15, 1997, period for comment. Because no exception to the notice-and-comment requirement exists in this case, the October 1997 interim rule is invalid.

Second, the 1997 interim rules are invalid because the BOP simply perpetuated its statutory interpretation of "convicted of a nonviolent offense" under the rubric of generalized discretion. As is clear from district courts' findings of fact, which are fully supported by the administrative record, the BOP improperly sought to overrule judicial decisions on statutory construction in violation of the principles of *stare decisis* and separation of powers articulated in *Neal v. United States*, 516 U.S. 284, 295 (1996). Most district courts have found that the generalized discretion asserted by the BOP was pretextual; its true object was to overrule the rejection of

its statutory position. In rejecting these district court decisions, some circuit courts failed to accord the deference to fact-finding required by *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985), and Rule 52 of the Federal Rules of Civil Procedure.

Third, the rules are invalid under the *Chevron* doctrine. These prisoners are categorically eligible for the incentive under the plain meaning of the statute. The BOP retains its broad discretion to exclude any prisoner who, in the warden's individualized exercise of discretion, constitutes a danger if granted early release. Because the rule creates a categorical exclusion inconsistent with the plain meaning of the statute, the regulation is invalid under *United States v. LaBonte*, 520 U.S. 751, 762 n.6 (1997), and *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). The agency action is not entitled to full *Chevron* deference in any event because the rules were not subject to the notice and comment required by the APA.

OPERATION OF THE SECTION 3621(e) INCENTIVE PROGRAM

To help combat the problem of recidivist substance abusers, the BOP set up experimental residential substance abuse treatment

programs prior to 1994. Very few prisoners participated. Without an incentive, most prisoners were reluctant to submit themselves to segregated housing, loss of prison industry jobs, full disclosure of private information and feelings to other inmates and to staff, and the hard work of confronting difficult behavioral and psychological issues.

To encourage more prisoners to seek treatment for their substance abuse problems, Congress enacted the Section 3621(e) incentive to fulfill the BOP's mandate to "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." 18 U.S.C. §3621(b). Congress specifically noted the success that various state substance abuse treatment programs had in substantially reducing relapse and recidivism. Congress directed that the BOP make residential substance abuse treatment available to an increasing number of eligible prisoners over the years. As an incentive to encourage prisoner participation prerequisite to curbing substance abuse and recidivism, Congress provided that prisoners convicted of "nonviolent offenses" could receive a reduction of up to one year from their sentence.

Due in large part to the incentive program, the number of prisoners participating in residential treatment has significantly increased.[2] This increased participation has had the desired effect of reducing relapse and recidivism:

> Federal inmates who underwent treatment were 73% less likely to be rearrested in the first six months after release than untreated inmates. Inmates who received treatment were also 44% less likely than those who had not received treatment to be detected for drug use within the first six weeks of their release.[3]

The program is very demanding. The BOP determines whether a prisoner has a substance abuse problem. 18 U.S.C. §3621(e)(5)(B)(i)). Eligible prisoners sign a behavior contract and agree to forego other available programming in order to participate. They live in segregated facilities within the prison. The BOP mental health and substance abuse specialists implement an array of treatments, such as rational-emotive/rational-behavioral therapy, development of interpersonal skills, changing criminal lifestyles, and

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[2]FEDERAL BUREAU OF PRISONS, SUBSTANCE ABUSE TREATMENT PROGRAMS, REPORT TO CONGRESS, at 8-9 (January 1999).

[3]FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU: ACCOMPLISHMENTS AND GOALS, at 1 (1998). *See also* FEDERAL BUREAU OF PRISONS, TRIAD DRUG TREATMENT EVALUATION: SIX-MONTH REPT., EXECUTIVE SUMMARY (1998).

relapse prevention.[4]

The prisoner is not deemed to have successfully completed the program until three phases are fulfilled. First, the prisoner must graduate from the residential component of the program, which usually takes between nine and twelve months. Second, there must be no failure during the in-prison transitional component. Third, the prisoner must successfully complete six months of community corrections.[5] If at any time during the residential, transitional, or community corrections components the prisoner commits a violation (for example, by using a controlled substance), the time reduction is forfeited, and the prisoner receives no benefit.[6]

Participation in the incentive program is limited by a number of restrictions implemented by the BOP.[7] Prisoners with prior convictions for specified violent crimes are excluded from the program. All prisoners who have detainers, whether for adjudicated

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[4]FEDERAL BUREAU OF PRISONS, SUBSTANCE ABUSE TREATMENT PROGRAMS, REPORT TO CONGRESS, at 5 (1999).

[5]The community corrections component during incarceration is authorized by 18 U.S.C. §3624(c).

[6]Program Statement 5330.10 at 5-7 (Oct. 9, 1997).

[7]*See* 28 C.F.R. §550.58 (1997).

or unadjudicated state charges or for immigration proceedings, are ineligible for the community corrections component and therefore cannot receive the Section 3621(e) incentive. Most importantly, the warden retains the individualized discretion to determine that a prisoner, regardless of other qualifications, should not be released into the community early and, therefore, is ineligible for the Section 3621(e) incentive.[8]

The anecdotal information matches the BOP's statistics -- the program is very successful. The residential treatment programs are an anomaly within prison cultures -- prisoners bare their souls to fellow inmates and staff. The need for full disclosure, protected only by other inmates' assertion of confidentiality, may actually endanger prisoners who disclose sensitive information regarding personal history or cooperation with authorities. Nonetheless, prisoners report that the program provides life-changing and life-saving skills. The incentive persuades prisoners to go through the door; once there, the incentive helps keep them there.

The number of prisoners affected by the categorical

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[8]Such individualized decisions, as opposed to rule-making, are explicitly exempted from the APA. 18 U.S.C. §3625.

exclusion based on mere possession of a firearm is substantial. From 1991 to 1999, more than 10% of drug-trafficking sentences -- 2,290 defendants sentenced in 1999 alone -- involved a two-level gun enhancement.[9] The gun enhancement is generally for mere possession -- even a co-conspirator's possession -- of a firearm.[10]

The Section 3621(e) time reduction is unique as the object of agency rule-making. Unlike other areas of administrative regulation, reduction in the actual time of incarceration is at stake, not rules governing business and manufacturing, not civil interests in areas such as employment and immigration, not even conditional release from custody. When the BOP determines that a prisoner is eligible and that prisoner begins participation, the BOP changes the prisoner's projected release date by reducing the term of

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[9]U.S. SENTENCING COMMISSION, 1991-1999 Datafile, USSCFY91-USSCFY99.

[10]If the firearm is an operative factor in relation to a drug offense, the consecutive mandatory minimum sentence under 18 U.S.C. §924(c) may be charged. Where the prisoner is sentenced under Section 924(c), there is no gun enhancement under the guidelines because the factor has already been taken into consideration (U.S.S.G. §2K2.4, comment. (backg'd)), but the prisoner is excluded from the Section 3621(e) incentive under separate rules. Program Statement 5162.04 § 6(a) (Oct. 9, 1997).

incarceration to be served, usually by twelve months.[11] When the prisoner successfully completes the three components of the program, the BOP unconditionally releases the prisoner to the district court's jurisdiction on supervised release with the term of incarceration permanently shortened by one year.[12] The prisoner's interest in actual freedom should subject the executive agency rule-making to especially close scrutiny. *See Dorszynski v. United States*, 418 U.S. 424, 443-44 (1974) (treatment program that "may" be available to youthful offender required exercise of individual sentencing discretion); *Stack v. Boyle*, 342 U.S. 1, 5-6 (1951) (qualified availability of pretrial release required consideration of individual circumstances).

ARGUMENT

A. Categorical Inclusion Of These Statutorily Eligible Prisoners Furthers The Congressional Goals Of Ameliorating Over-Incarceration And Reducing Recidivism By Encouraging Participation In Intensive In-Prison Residential Substance Abuse Treatment.

The legislative background for the 1994 amendments

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[11]Program Statement 5330.10, Attachment H (Oct. 9, 1997).

[12]Program Statement 5880.28 at 78 (June 30, 1997); *see also* 18 U.S.C. §3624(a).

creating the Section 3621(e) time reduction included three trends: (1) federal incarceration rates were sharply increasing largely due to mandatory minimum statutes and guidelines sentencing; (2) the percentage of arrestees with substance abuse problems was markedly high; and (3) in-prison substance abuse treatment programs were proving their effectiveness.

Federal incarceration rates have increased greatly since the first federal mandatory minimum drug statutes were enacted in 1986. In 1986, 12,119 of the 31,831 prisoners in federal prison -- 38% -- were serving drug sentences. By 1998, the number of prisoners serving drug sentences increased to 58,291 out of 95,552 federal prisoners -- 58% of the prison population.[13] During this period,

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[13]FEDERAL BUREAU OF PRISONS, QUICK FACTS (APRIL 2000). This increase is consistent with a long-term trend:

FEDERAL PRISON POPULATION

Year	Total sentenced population	Total sentenced drug offenders	Percentage of sentenced prisoners who are drug offenders
1970	20,686	3,384	16.30%
1975	20,692	5,540	26.70%
1980	19,023	4,749	24.90%
1985	27,623	9,491	34.30%
1990	47,847	25,037	52.30%
1995	79,347	48,118	60.60%
1998	95,522	56,291	58.90%

federal drug prosecutions increased sharply, both as a percentage of federal sentencings and in raw numbers. In 1991, the 13,281 federal drug sentencings accounted for 42% of federal non-immigration sentences; in 1999, the 21,634 federal drug sentences constituted 50% of such federal sentences.[14]

Addiction and substance abuse are highly correlated to arrests. 1994 witnessed an increasing trend of arrestees testing positive for illicit drugs, with the percentage increasing from 60% in 1992, to 63% in 1993, and to 66% in 1994.[15] This trend continues. In 1991, 32% of federal prisoners reported using drugs in the month before the offense, and 10% reported drinking at the time of the offense; by 1997, the percentage of self-reported drug users increased to 45% , and those reporting drinking increased to 20%.[16]

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[14]U.S. SENTENCING COMMISSION, 1991-1999 Datafile, USSCFY91-USSCFY99.

[15]NATIONAL INST. OF JUSTICE, 1994 ANNUAL REPORT ON ADULT AND JUVENILE ARRESTEES, at 1 (1995).

[16]Christopher J. Mumola, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, SUBSTANCE ABUSE AND TREATMENT, STATE AND FEDERAL PRISONERS, 1997, at 1 (January 1999).

Not surprisingly, drug use is correlated to drug-trafficking crimes.[17]

Prior to 1994, a number of states established in-prison treatment programs for substance abuse. Follow-up studies indicated that the programs were effective in greatly reducing relapse and recidivism. Congress specifically referred to such studies in deciding that a federal incentive program was needed. *See* 139 Cong. Rec. H8723-01, H8727 (Nov. 3, 1993) (National Drug Research Institute study reported that 79% of the prisoners who underwent treatment had not reoffended after five years compared to only 33% who did not undergo treatment); H.R. Rep. 103-320 (Nov. 3, 1993) (noting success of corrections treatment programs in New York, Wisconsin, and Virginia); *id.* at 5 (although 50% of federal inmates had substance abuse problems, only 6% of the prisoners had participated in the substance abuse program since its inception). The committee concluded that "the experience of treatment programs at the State level shows that inmates who are given an incentive to begin treatment often realize that the effort will ultimately yield a meaningful improvement in the inmate's life

[17]*See generally* NATIONAL INST. OF JUSTICE, ARRESTEE DRUG ABUSE MONITORING PROGRAM, 1998 ANNUAL REPORT (1999).

opportunities, and will undertake to complete the program." *Id.* at 6.

The Section 3621(e) incentive program is effective in reducing recidivism and substance abuse among prisoners, including those convicted of drug-trafficking offenses whose sentences were increased for weapons possession. Remedial legislation "should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *see also Bifulco v. United States*, 447 U.S. 381, 387 (1980) (the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose"). The Court should reject administrative actions that are "inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *BATF v. FLRA*, 464 U.S. 89, 97 (1983) (quoting *NLRB v. Brown*, 380 U.S. 278, 291-91 (1965)).

B. Congress Intended That Prisoners "Convicted Of A Non-Violent Offense," Which Includes Drug Traffickers, Should Be Categorically Eligible For The Section 3621(e) Incentive.

The enactment of Section 3621(e) reflected congressional intent that drug traffickers should be eligible for sentence reduction

based on completion of a demanding and effective treatment program.

As originally proposed, Section 3621(e) simply provided that all prisoners who successfully completed residential substance abuse treatment were eligible for up to a one-year reduction in their sentence. By amendment, Congress added the qualifying phrase "convicted of a nonviolent offense." The phrase "non-violent offense" was used in the Sentencing Commission's then-guideline on diminished capacity departures, U.S.S.G. §5K2.13, and was generally interpreted to mean an offense that was not a "crime of violence" under 18 U.S.C. §924(c)(3) or did not involve actual violence. *United States v. Valdez*, 158 F.3d 1140, 1142-43 (10th Cir. 1998) (citing cases).[18]

In the original regulation implementing Section 3621(e), the BOP explicitly referred to Section 924(c)'s definitional section to distinguish offenses that are not nonviolent for the purposes of

[18]Between 1991 and 1999, thirty-seven drug traffickers who had received the two-level weapon possession enhancement received diminished capacity departures as eligible nonviolent offenders. U.S. SENTENCING COMMISSION, 1991-1999 Datafile, USSCFY91-USSCFY99.

Section 3621(e).[19] Drug-trafficking offenders, regardless of whether they received a two-level enhancement under U.S.S.G. §2D1.1(b)(1) for mere possession of a gun, were "convicted of a nonviolent offense" under both Section 924(c) and U.S.S.G. §5K2.13. The case law sharply distinguished between "crimes of violence" and drug-trafficking offenses under Section 924(c). *Downey v. Crabtree*, 100 F.3d 662, 668 (9th Cir. 1996) (citing cases). When the BOP categorically denied eligibility for such prisoners based on a program statement purportedly implementing the regulation, the circuits almost uniformly rejected the program statement as a violation of the plain and unambiguous meaning of the statute. *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998), *modified*, 172 F.3d 411 (6th Cir. 1999); *Byrd v. Hasty*, 142 F.3d 1395 (11th Cir. 1998); *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998); *Fristoe v. Thompson*, 144 F.3d 627 (10th Cir. 1998); *Roussos v. Menifee*, 122 F.3d 159 (3rd Cir. 1997); *Downey v. Crabtree*, 100 F.3d 662 (9th Cir. 1996).

Despite Congress's clear intent that prisoners be encouraged to participate in an intensive substance abuse treatment program, the BOP has sought to categorically bar prisoners, who have been

[19]28 C.F.R. §550.58 (1995).

judicially declared statutorily eligible, from participating in the Section 3621(e) incentive program because they are not "nonviolent" offenders. Congress has already specifically addressed the question of categorical eligibility based on the offense of conviction, which includes drug traffickers who are serving a longer sentence based on weapon possession. Congress's intent that such prisoners receive the treatment incentive should not be administratively trumped, especially where the BOP retains broad discretion to exclude prisoners individually determined to be too dangerous to participate in community corrections. *Ward v. Booker*, 202 F.3d 1249, 1255-57 (10th Cir. 2000); *Kirkpatrick v. Houston*, 36 F. Supp. 2d 1328, 1329-30 (N.D. Fla.), *affirmed*, 197 F.3d 1143 (11th Cir. 1999); *see Bowen v. Hood*, 202 F.3d 1211, 1225-27 (9th Cir. 2000) (Thomas, J., dissenting); *Orr v. Hawk*, 156 F.3d 651, 654-56, *modified*, 172 F.3d 411 (6th Cir. 1999).

C. The BOP Promulgated The October 1997 Interim Rules In Violation Of Notice-And-Comment Requirements Of The APA.

The BOP's October 1997 rules are not only contrary to judicial interpretation of Section 3621(e) but were also adopted in violation of the APA. 5 U.S.C. §553. Non-compliance with the

statutory requirements for promulgating new rules provides an independent basis for striking down the BOP's ill-conceived rule. Indeed, had the BOP complied with the notice-and-comment requirements of the APA before putting the contested rules into effect, the need for judicial scrutiny of the rules and the resulting circuit split might have been avoided.[20]

The APA establishes specific rule-making requirements that apply to all federal agencies except those specifically exempted. 5 U.S.C. §553(a). Certain BOP actions relating to determinations for individual prisoners are exempt from the APA's requirements, but the exemption does not extend to the BOP's rule-making activities.[21]

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[20]Given four years of participation in the Section 3621(e) program, many prisoners with the same sentencing enhancement as Mr. Lopez have received the incentive without harm to the public. The rule also conflicts with other BOP rules eliminating mere possession of a firearm during a drug-trafficking offense as a "public safety" factor -- that is, a factor requiring increased security measures to ensure society's protection. Program Statement 5100.07 §7 (1999) (noting that possession of firearms as a public safety factor warranting increased security was discontinued in 1995).

[21]18 U.S.C. §3625 (removing applicability of certain sections of the APA, but not Section 553, which establishes rule-making requirements); *see* S. Rep. No. 98-225, at 149 n.363 (1984), *reprinted in* U.S.C.C.A.N. 3182, 3332 ("The APA continues to apply to regulation-making authority of the Bureau of Prisons.").

The BOP explicitly invoked its rule-making authority under the APA when promulgating the October 1997 interim rules. 62 Fed.Reg. 53690.

Section 553 provides generally that, at least thirty days before the effective date, an agency must publish notice of proposed rule-making in the Federal Register and afford "interested persons an opportunity to participate . . . through submission of written data, views, or arguments." Section 553 applies to all substantive rules unless the rule falls under one of the few exceptions. *See generally Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979).

The BOP's October 1997 rules are substantive because they require BOP staff to categorically disqualify from Section 3621(e) eligibility all prisoners who possessed weapons during an offense. 5 U.S.C. §553(b)-(d). The rules themselves are the measure the BOP uses in the administrative adjudicative process and, thus, have the effect of law. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87,

99 (1995).[22]

Because the interim regulations were substantive rules, "the promulgation of these regulations must conform with any procedural requirements imposed by Congress." *Chrysler Corp.*, 441 U.S. at 303. The Court "must determine whether the agency complied with the procedures mandated" by the APA. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 549 n.21 (1978). Failure to follow Section 553(d)(3)'s thirty-day advance notice requirement invalidates the regulation. *See Morton v. Ruiz*, 415 U.S. 199, 235-36 (1974) (promulgation of regulation without following the APA "renders it ineffective so far as extinguishing rights of those otherwise within the class of beneficiaries").[23]

While the BOP invoked the rubric of notice and comment,

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[22]Even if the rules were deemed interpretive, under *Guernsey*, they are an abrupt departure from the construction of the former regulation as well as the Operating Memoranda and therefore would still require notice and comment. 514 U.S. at 100 ("We can agree that APA rulemaking would still be required if [the regulation] adopted a new position inconsistent with any of the Secretary's existing regulations.").

[23]Program Statement 5162.04 purports to interpret the regulations at issue here. Because those regulations were promulgated in violation of the APA, the program statement would also be invalid.

the agency failed to comply with the specific notice-and-comment requirements of the APA. On and before October 9, 1997, before the interim rules were even published, the BOP put the rules into immediate effect and began rejecting new applicants who had possessory offenses. In fact, at least one prisoner was denied eligibility based on the new rules on September 27, 1997 -- *two weeks before they were even issued. Gavis v. Crabtree*, 28 F. Supp. 2d 1264, 1266 (D. Or. 1998).

Not until October 15, 1997, did the BOP publish the proposed interim rules in the Federal Register. 62 Fed.Reg. 53690 (Oct. 15, 1997). That publication stated the retroactive effective date of the rules as October 9, 1997. The belated Federal Register notice established a comment period, as required by the APA, but the final date for comments was December 15, 1997, more than two months after the effective date of the interim rules. By putting the rules into effect before they were even published, the BOP violated the APA requirement that publication of a rule be made at least thirty days before its effective date.

The published notice did not invoke any exception to the thirty-day requirement, nor would any exception apply. The

exceptions to the thirty-day requirement are available only where the substantive rule relieves a restriction or grants an exemption, or if good cause is found and reasons to waive the thirty-day advance notice requirement are stated in the text of the proposed rule. 5 U.S.C. §553(d). To avail itself of the latter exception, the agency must determine that compliance with the thirty-day requirement is either impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. §553(b)(B). In all other cases, "notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp.*, 441 U.S. at 316.

Neither of the exceptions to the APA's thirty-day notice-and-comment requirement applies to the BOP rules. The rules do not exempt the prisoners from a restriction or grant an exemption. On the contrary, the rules have precisely the opposite effect: they disqualify otherwise eligible prisoners from the incentive program. Nor has the BOP asserted in the Federal Register any good cause to waive the thirty-day requirement. The only reason the BOP provided for the change in the rules was its intention to "resolve conflicts" among the circuit courts' interpretation of the statute.

There was no urgency that excused compliance with the thirty-day rule, especially considering that similarly-situated prisoners had been receiving the incentive for the past four years without apparent harm to the public.

D. The District Courts Have Found As A Matter Of Fact That The Agency Is Merely Perpetuating Its Erroneous Construction Of The Statute.

The district courts in Section 3621(e) litigation have found that the BOP's purported exercise of discretion simply reiterated the agency's statutory interpretation that the circuit courts previously rejected.[24] Such factually-based decisions are entitled to deference where based on the fact-finder's review of documentary evidence, inferences from other facts, and familiarity with the area in dispute. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985); Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous...."). According appropriate deference to factual findings

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[24]The circuit opinions in the present case, *Ward, Kirkpatrick*, and *Bowen* arose from district court decisions granting relief to prisoners under the October 1997 rules. *See also Samples v. Scibana*, 74 F. Supp. 2d 702 (E.D. Mich. 1999); *Nelson v. Crabtree*, 59 F. Supp. 2d 1081 (D.Or. 1999); *Williams v. Clark*, 52 F. Supp. 2d 1145 (C.D. Cal. 1999); *Guido v. Booker*, 37 F. Supp. 2d 1289 (D.Kan. 1999); *Hicks v. Brooks*, 28 F. Supp. 2d 1268 (D. Col. 1998).

is critical to resolution of the claim that, under the separation of powers doctrine and *stare decisis*, the 1997 rules are an invalid attempt to reverse judicial determination of a statute's meaning.

In *Neal v. United States*, 516 U.S. 284 (1996), this Court addressed a claim that subsequent amendments by the Sentencing Commission could alter the previous judicial determination of a statute's meaning. Even with full notice-and-comment and the Sentencing Commission's quasi-judicial status, the Court adhered to its previous interpretation of the statute, invoking both the judicial role and *stare decisis*. *Neal*, 516 U.S. at 295.

The district courts have held the October 1997 rules invalid because the underlying documentary and regulatory context establishes that the agency simply used the gloss of discretion to repeat its invalidated interpretation of the statute. The published district court opinions in this area have generally found the BOP's new rules invalid based in part on findings regarding the nature of the rule change.

The findings that the BOP's October 1997 rules are simply a continuation of its rejected discretionary interpretation of the statute are amply supported by the record. The BOP admitted in the

Federal Register that it sought to avoid judicial rulings. 62 Fed. Reg. 53690 (Oct. 15, 1997).[25] Both the former and the October 1997 program statements use virtually indistinguishable language in categorizing offenses and in providing the BOP's rationale and examples. *Scroger v. Booker*, 39 F. Supp. 2d 1296, 1308-09 (D.Kan. 1999), *affirmed*, *Booker*, *supra*; *compare* Program Statement 5162.04 §6(b) (Oct. 9, 1997) *with* Program Statement 5162.02 §9 (April 23, 1996). Further, in previous litigation, the BOP specifically claimed that its statutory construction was correct based on former 42 U.S.C. §3796iii-2(1)-(A) (repealed), which used a definition of violent offender indistinguishable from the new rule. As the Sixth Circuit noted, the new regulations are simply a rerun of that failed statutory argument. *Orr*, 156 F.3d at 653.

The failure to respect district court findings regarding the nature of the new rules is one fault line in the split of the circuits. The Eighth Circuit and the Ninth Circuit majority declared prior statutory construction "as of no relevance." *Bellis v. Davis*, 186 F.3d

[25]The BOP's violation of the APA supports the conclusion that the October 1997 rules were merely a continuation of a failed litigation position.

1092, 1095 (8th Cir. 1999); *see Bowen*, 202 F.3d at 1219 (adopting *Bellis* regarding irrelevance of former statutory construction). The BOP's perpetuation of its statutory misinterpretation of Section 3621(e) formed an important part of the reasoning of the judges who found the rules invalid. *Booker*, 202 F.3d at 1255; *Kilpatrick*, 36 F. Supp. 2d at 1329; *see Bowen*, 202 F.3d at 1226-27 (Thomas, J., dissenting).

E. The Regulation Is Invalid Under *Chevron* Because It Is Inconsistent With An Unambiguous Statute.

The majority of courts that addressed what, if any, *Chevron* deference is owed found the statute plain and unambiguous. *See Byrd*, 142 F.3d at 1397 (citing cases) (BOP interpretation excluding those who received sentence enhancements for weapons possession conflicts with statute's plain meaning). Where the statute is unambiguous, agency rules are not permissible if inconsistent with authorizing statutes. *LaBonte*, 520 U.S. at 762 n.6; *Chevron*, 467 U.S. at 842-43.

The BOP's disregard of the plain and unambiguous terms of the statute is compounded by its violation of the APA. Full *Chevron*

deference only applies where the rule has undergone "the rigors of the Administrative Procedur[e] Act, including public notice and comment." *Reno v. Koray*, 515 U.S. 50, 61 (1995); *accord Christensen v. Harris County*, 120 S.Ct. 1655, 1662 (2000). The Sixth Circuit has specifically found that full *Chevron* deference does not apply to these rules because they were promulgated without notice and comment. *Orr*, 156 F.3d at 655.[26] The contrary, incorrect assumption may have contributed to the circuit split. In *Bush v. Pitzer*, 133 F.3d 455, 457 (7th Cir. 1997), the court erroneously assumed that the new rule was promulgated in compliance with the notice-and-comment requirements of the APA. Both *Bellis*, 133 F.3d at 1094, and the *Bowen* majority, 202 F.3d at 1219-20, relied on this flawed case.[27]

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[26]In *Orr*, the court ruled in favor of the *pro se* petitioner, under the October 1997 rules, then modified its opinion to delete some references to the new rules upon the BOP's argument on rehearing that the new rules did not apply retroactively to Mr. Orr. The court's finding regarding *Chevron* survived the modification.

[27]*Bush* is also flawed because, under the BOP's own rules on retroactivity, the *pro se* prisoner was not subject to the October 1997 rules because he had entered the treatment program prior to the rule's effective date. Nonetheless, the BOP made no effort to correct the court's unbriefed error. The same error undermines the validity of *LaSorsa v. Menifee*, 10 F.Supp.3d 316 (S.D. N.Y. 1998), *affirmed*, 182 F.3d 900 (2nd Cir. 1999) (table).

The Court has stated that where "the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (1984). Once a statute is found to be unambiguous, no deference is owed to the agency. *LaBonte*, 520 U.S. 751 n. 6 (1997). Here, the circuit courts correctly held that the plain and unambiguously expressed intent of Congress was that drug traffickers, regardless of sentencing factors, are eligible for the Section 3621(e) incentive. The BOP's inconsistent rule, promulgated without the required notice and comment, is invalid under *Chevron* and *LaBonte*.

CONCLUSION

In practical terms, the question is not whether to release or to confine drug offenders who possessed firearms. The question is whether offenders who possessed firearms and who are substance abusers should be released with their substance abuse problems intact, or whether they should be released a short time earlier with their substance abuse problems treated. Because Congress has answered this question, the BOP cannot provide a conflicting answer. Therefore, the opinion of the Eighth Circuit allowing the

BOP to contradict the statute and congressional intent should be reversed.

Respectfully submitted,

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